IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor.	In Proceedings For The Reorganization of a Railroad CASE NO. 70-347 JUDGE FULLAM

PROPOSED **ORDER**

AND NOW, this _____ day of _____, 200___, upon consideration of the Petition of Penn Central Transportation Co. and America Premier Underwriters, Inc. to Enforce Order No. 4349, and the response thereto filed by claimants, Knapik, et al., Sophner, et al., and Bundy/Watjen, et al. It is hereby ORDERED that the Petition is DENIED. It is further ORDERED that:

1. The Petition to Enforce Order No. 4349 is DENIED. The pending litigation in the Northern District of Ohio and the arbitration therein shall proceed to conclusion as previously authorized by this Court in Document Nos. 5383 and 8600, and subject to the conditions set forth in those documents. Neither the Arbitration Panel, nor the claimants will be otherwise enjoined or limited by this Court in the conduct of said proceedings or the decision rendered.

2. Any judgment which may result from that litigation may be enforced as specifically authorized by this Court.

BY THE COURT:

_____
Hon. John P. Fullam, U.S.D.J.

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BRIEF IN OPPOSITION TO PETITION OF PENN CENTRAL TRANSPORTATION COMPANY AND AMERICAN PREMIER UNDERWRITERS, INC. TO ENFORCE ORDER NO. 4349

I. INTRODUCTION

The Petitioners' motion should be denied because: 1) it violates standard bankruptcy practice of first allowing non-bankruptcy courts to fully value the claims before a subsequent Bankruptcy Court determines which claims are collectible; 2) the motion is not ripe because it assumes future contingent events; 3) a Bankruptcy Court, after it has a full factual record before it, has discretion to permit interest, fees, and penalties; 4) the motion failed to allege, let alone prove, any of the elements required for injunctive relief; and 5) American Premier Underwriter's attempt in the proposed Order to add a last-sentence request for an advisory opinion protecting it from liability is in bad faith because it is wrong as a matter of law, unripe, and was never argued or discussed in Petitioners' brief.

Petitioners are Penn Central Transportation Company ("PCTC") and American Premier Underwriters ("APU") f/k/a Penn Central Corporation ("PCC"). This Petition is the eighth attempt in thirty days to prevent the Arbitration Panel from considering all, or part, of the

Claimants' case. Although framed as a Petition to "Enforce Order No. 4349", the Petition, is in fact, a request for reconsideration and modification of that order, and, further, a request for an entirely new dispositive order intended to protect APU.

For the reasons set forth below, this Court should deny the Petition, should allow the Arbitration Panel to complete its work, and then should consider all of the opposing arguments after a full and complete record is presented before the Court.

II. FACTS

A. MPA Claims Were Paid Continuously Throughout The Penn Central Bankruptcy.

On May 14, 1964, the Pennsylvania Railroad, the New York Central Railroad and the respective labor unions of their employees signed a Merger Protection Agreement ("MPA"). The MPA provided for guaranteed payments to workers in the event that they suffered any loss of wages following the merger. On February 1, 1968, the railroads merged to form PCTC.

On June 21, 1970, PCTC filed for bankruptcy. Throughout the course of the bankruptcy, PCTC and its trustees continued to pay MPA claims to workers on a regular basis. PCTC paid out $116.3 million in MPA benefits to workers from 1968 to 1972 without any reduction via bankruptcy or for other creditors. *Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail,* 531 F. Supp. 1191, fn. 176 (Sp.Ct.R.R.R.A., 1981). At least through, 1975, PCTC paid out MPA benefits to workers within sixty to seventy-five days of their claims.[1] *See e.g.* Exhibit A attached hereto. These labor claims were paid on a timely basis because either; 1) they were administrative expenses, 2) they were contracts

[1] For example, on June 17, 1975, Mr. P.V. Behnen requested benefits for wages lost in May 1975. Exhibit A at p. 1. PCTC approved payment in less than two months, and actually made payments within 70 days of the request. Id. at p.2. At no time were these MPA payments reduced or delayed by the pending bankruptcy case.

assumed by the estate, or 3) Section 1167 of the Bankruptcy Code (previously codified as §77(n)) requires a railway in reorganization to honor its collective bargaining agreements.[2]

B. After Nearly Forty Years, Plaintiffs' Claims Have Never Been Paid.

This action was filed in the United States District Court for the Northern District of Ohio in 1969 by thirty-two New York Central employees. PCTC refused to pay any of the claimants under the MPA, twenty-six of them on the grounds that they worked for a subsidiary of the New York Central and were not covered by the MPA. In 1974, the Interstate Commerce Commission ("ICC") ruled against PCTC and held that the employees of subsidiary railroads such as the claimants, were in fact covered. *Pennsylvania Railroad Co. – Merger – New York Central Railroad Co.* 347 ICC 536, 554 (1974). However, after more than 33 years, PCTC has still not paid the claimants.

C. PCTC & APU's Forty-Year History of Tactical Delays.

PCTC/APU have successfully delayed this case for years by forcing claimants to litigate endless procedural issues and then re-litigate previously decided legal issues. For example, although the ICC ruled that the claimants as employees of subsidiary railroads were covered by the MPA, PCTC insisted on re-litigating this coverage issue during the a trial before Federal Court Judge Lambros in 1976 and as PCC, again in 1990 in an arbitration proceeding.

In 1979, the Claimants requested a jury trial. In order to avoid a jury trial, PCTC/PCC successfully moved for arbitration, executed an arbitration agreement in 1980, and participated in these same arbitrations in 1983 and 1990, all after the issuance of the Final Consummation

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[2] Section 77(n) of the Bankruptcy Act, 11 U.S.C. s 205(n), provides:

> No judge or trustee acting under this (Act) shall change the wages or working conditions of railroad employees except in the manner prescribed in (the Railway Labor Act) . . .

Order.[3] Then after remand from the Surface Transportation Board, PCTC/APU refused to participate in the arbitration until ordered to do so by Judge Solomon Oliver of the U.S. District Court for the Northern District Ohio. Just like it has done through this Petition, when PCTC/APU did not get the result it had hoped for, PCTC/APU requested equitable relief and a reconsideration of Judge Oliver's decision.

After reviewing the full record of the litigation, Judge Oliver became fed up with Penn Central's tactics, ordered the parties to arbitration and noted that:

> '[H]e who comes into equity must come with clean hands.' The Court concludes that Defendant does not come with clean hands.

Order, February 18, 2005 at 2. Exhibit F.

Undeterred by Judge Oliver's finding, PCTC/APU has continued its strategy of delay. In just the last month, PCTC/APU has made six motions to the Arbitration Panel with the intended effect of delaying arbitration. All of these motions have been denied on their merits by the arbitration panel.

Now, PCTC/APU is seeking a new forum, and has made three requests to this Court to enjoin all or part of the arbitration -- the very arbitration which it had requested in order to avoid a jury trial. This Petition was served upon Claimants electronically during the middle of

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Section 77(N) specifically precluded a reorganization court or a trustee from doing anything to modify or affect wages or working conditions of railroad employees except in the manner prescribed by the Railway Labor Act (45 U.S.C.A. § § 151-164).

[3] PCTC/APU now argue that the successor entity, American Premier Underwriters, has no liability here. However, the representations of these Defendants only underscore their liability. PCTC/APU executed the 1980 Arbitration Agreements "for the employees of Penn Central Corporation." Exhibit B. The Defendants appeared before the Sixth Circuit Court of Appeals in this case as PCC. Exhibit C. Until weeks ago, when it adopted a new strategy of no liability, its responses in the case were all on behalf of Penn Central Corporation. Exhibit D. Its own expert admitted that American Premier Underwriters was the client in this case. Weinman deposition at pgs. 91-92. Exhibit E.

the telephonic final pretrial conference, just five days prior to the arbitration. The timing and method of service of the Petition were intentionally designed to disturb the final pretrial conference and create distractions during trial preparation. When Claimants requested an agreed extension of time to respond to the Petition due to the contemporaneous arbitration hearing, PCTC/APU refused. It is clear that the purpose of this Petition was to disrupt Claimants' trial preparation and force Claimants to litigate in two different courts at the same time. It is unfortunate that the resources of this Court are being used in such a manner.

D. The Case File For The Penn Central Bankruptcy Is Stored Off-Site And Is Necessary For A Complete Record.

After a complete record is available, Claimants expect to research and litigate many of the bankruptcy issues which are asserted by PCTC/APU. Bankruptcy is often a fact-specific, and fact-intensive proceeding which relates to specific sections of law. However, PCTC/APU's naked allegations are made without any citation to a single section of the bankruptcy code. The files of the Penn Central bankruptcy case are voluminous and involve many issues. Yet glaringly, PCTC/APU does not cite a single Order or discussion that specifically references or discusses the MPA. At best, PCTC/APU can cite to a general unexplained reference to "estimated employee labor claims." Without further investigation it is impossible to determine whether these are general collective bargaining obligations, personal injury claims, or unemployment claims. There is no reference to the MPA or prior decisions regarding MPA claims. PCTC/APU hopes to force a rapid decision before the entire record of the bankruptcy can be requested from the Court's off-site storage facility and reviewed by the Court and the parties.

E. After Forty Years, An Arbitration Panel Will Finally Render A Decision on The Merits And With Regard To The Full Value of Plaintiffs' Claims.

The Arbitration Panel heard evidence from December 10 through December 12, 2007 and concluded the hearing with final arguments on December 13, 2007. Post-Hearing Briefs are due forty-five days after the transcript is available, or approximately February 15, 2008. Reply Briefs are due fifteen days thereafter. Following the close of briefing, the Arbitration Panel will confer and will issue its Opinion. This Arbitration Panel will finally rule on the merits of the claimants' complaints and will issue a complete award, if any, as it deems appropriate.

III. LAW & ARGUMENT

A. Standard Bankruptcy Practice Is To Allow Non-Bankruptcy Courts To Fully Value and Liquidate Claims, Including Interest, Fees, And Penalties. After The Claims Are Valued, Bankruptcy Courts Determine Which Damages They Will Permit To Be Collected.

PCTC/APU claims that the Arbitration Panel should be enjoined from even considering the issue of interest. This is not the law. The law and practice is that an Arbitration Panel determines the amount of the claim, including interest, and then, if appropriate, the Bankruptcy Court determines whether the interest is collectible. *In re Clayton*, 195 B.R. 342 (Bkrtcy.E.D.Pa.,1996).

In *Clayton*, the Bankruptcy Court considered the proper division of responsibilities between the Arbitration Panels and the Bankruptcy Court. In *Clayton*, one of the issues was whether debts which had not been discharged in bankruptcy should be payable with interest. In its first bold subject-heading, the *Clayton* Court ruled that under its prior holdings that:

> WE SHOULD USUALLY ONLY DETERMINE DISCHARGEABILITY AND ALLOW NONBANKRUPTCY COURTS TO LIQUIDATE NONDISCHARGEABLE OBLIGATIONS SUPPORTS THE CONCLUSION THAT NONBANKRUPTCY COURTS SHOULD BE FREE TO MEASURE ALL

ASPECTS OF DAMAGES FROM NONDISCHARGEABLE OBLIGATIONS, INCLUDING AWARDING PUNITIVE DAMAGES AND ASSESSING DAMAGES." (original emphasis).

Id.

The *Clayton* Court divided the responsibilities for determining the amount of the liquidated damages for the non-bankruptcy courts, on the one hand, from the Bankruptcy Court's responsibility of determining which debts had been discharged, on the other hand. "This approach results from the following general principle enunciated by us most recently in *In re Cohen*, 1995 WL 346948, at *3 (Bankr.E.D.Pa. June 5, 1995): "The role of a Bankruptcy Court in a dischargeability proceeding is merely to determine whether certain claims are dischargeable or not, not to liquidate those claims. *See In re Stelweck*, 86 B.R. 833, 844-45 (Bankr.E.D.Pa.1988), *aff'd sub nom. United States v. Stelweck*, 108 B.R. 488 (E.D.Pa.1989). **The task of liquidation falls to nonbankruptcy courts**, . . . *Accord, e.g., In re Shapiro,* 188 B.R. 140, 149 (Bankr.E.D.Pa.1995) (FOX, J.); and *In re Kelley*, 163 B.R. 27, 33 (Bankr.E.D.N.Y.1993). It seems to us that the assessment of punitive damages and **interest** by the C.C.P. or other applicable non-bankruptcy courts is simply an aspect of the liquidation of claims. . ." *Id.* (emphasis added).

Thus the *Clayton* Court determined that non-bankruptcy panels should determine the full liquidated amount of the injury, then the Bankruptcy Court determines which damages are recoverable or, alternatively, discharged. PCTC wants to violate this practice.

Next, the *Clayton* Court considered whether to award interest. It noted that "consistent with this court's holding that the Plaintiff is entitled to nondischargeability of all sums liquidated as damages in connection with its nondischargeable claim against the Debtor is **the general rule that sums such as interest, which are ancillary to a nondischargeable debt, are also**

nondischargeable. *See, e.g., In re Hunter*, 771 F.2d 1126, 1131-32 (8th Cir.1985); *In re Levitsky*, 137 B.R. 288, 291-92 (Bankr.E.D.Wis.1992); and *In re Foster*, 38 B.R. 639, 640 (Bankr.M.D.Tenn.1984)." *Id.*

Of great significance here, is that the *Clayton* Court chose not to award interest because the Creditors had not requested interest during the non-bankruptcy court proceeding. This is exactly what PCTC/APU hopes will happen here: by attempting to enjoin the Arbitration Panel from awarding interest, PCTC/APU can later argue to the Bankruptcy Court that Claimants' are barred from interest because the Arbitration Panel did not allow it. That is not the proper procedure.

PCTC/APU's Petition to enjoin the panel from deciding the issue of interest is simply its latest procedural trick to reduce its liability in this case. It recognizes that after 40 years, it has successfully reduced the value of Claimants' nominal damages. The majority of damages in this case is attributable to interest largely due to delays caused by PCTC/APU. The proper procedure is for the Arbitration Panel to determine the entire amount of the liquidated claim, and then allow a court of competent jurisdiction to determine if interest is collectible.

Moreover, the affect of PCTC/APU's motion would be to prevent the Arbitration Panel from awarding full damages. Ultimately, in all likelihood, the issue of the Claimants' entitlement to interest will be presented to an appropriate appellate court. If the Arbitration Panel is prevented from awarding interest and an appellate court were to ultimately find an entitlement to interest, the case would have to go back to the Northern District of Ohio, have the Court order the Arbitration Panel to be reconvened perhaps years after considering the evidence and then have the panel reconsider the award. On the other hand, if the panel is not artificially constrained, its award will then be subject to appeal without any need to reconvene the panel at

some later date. In that situation if the panel is wrong in its award, any disallowable amounts would simply be deducted from the total. The correct practice is to allow the Arbitration Panel to fully liquidate the claim including interest, and then, after complete liquidation, to determine the collectability of the debt.

B. Penn Central's Claim Is Not Ripe.

PCTC/APU's Petition requesting this Court to essentially reconsider and order relief from its voluntary stipulation, is not ripe. Courts will not consider controversies that are contingent upon a future event. *Hoxha v. Levi*, 465 F.3d 554, 556 (3d Cir. 2006)("The ripeness doctrine clearly precludes us from resolving questions that will have practical relevance to the parties only if a contingent event occurs at some future time); *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir.2004) (noting that a case "ripe for judicial intervention . . . cannot be 'nebulous or contingent' but 'must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.'")(*quoting Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 97 L.Ed. 291 (1952)).

Based upon their speculation of future, contingent events, PCTC and APU have asked this Court to enjoin and limit an arbitration ordered by the United States District Court for the Northern District of Ohio. The grounds for their petition are that, in the future, the Arbitration Panel might render a judgment for interest against PCTC and APU.

PCTC/APU have not explained why this Court should depart from established bankruptcy practice in order to prevent the Arbitration Panel from fully liquidating the claims. If the Arbitration Panel rules in favor of PCTC, or denies interest, there is no claim to review. The purported controversy is contingent upon whether the Arbitration Panel finds in favor of the

respondents; whether Claimants seek to enforce the judgment in the Northern District of Ohio; and whether such enforcement violates the authority of this Court. If the Arbitration Panel finds that Penn Central is not liable, then there is no case or controversy. Nonetheless, PCTC and APU argue only that at some future point after the Northern District of Ohio concludes this matter, if a judgment is rendered against PCTC and APU, the Claimants may assert legal positions with which PCTC and APU may disagree.

Under any reading of the stipulation of arbitration, the parties contemplated that the matters at issue would be fully and completely litigated and would "continue to a conclusion" in the Northern District of Ohio. No injunction is necessary. The matter has not been concluded in that Court. There is no issue that is presently ripe that could conceivably warrant such relief. If PCTC/APU are worried about arguments that might be made after the decision is rendered by the Northern District of Ohio's Arbitration Panel, it is at that time that PCTC and APU should seek to raise any argument with this Court if appropriate. Obviously, if the Arbitration Panel were to find for PCTC/APU, the case would be concluded, except for any appropriate appeals. In any event, the Arbitration Panel, acting as an arm of the Northern District of Ohio, has not taken any action which would warrant any type of injunctive relief in this matter. Because the existence of any controversy is contingent upon future actions, the Petition to Enjoin is not ripe.

C. Interest, Fees And Penalties Are Within The Discretion of A Bankruptcy Court And Should Be Decided With The Benefit of A Full Record.

PCTC/APU claims that if Claimants are ever awarded any interest, that these Claimants, who have waited for forty years, will have a preference over the other employees who were paid over $116 million during the early 1970's. PCTC/APU asserts that "equal treatment" is served by paying some workers within ninety-days, while making other Claimants wait decades. In order to avoid such "preferences," PCTC/APU claims that interest is never allowed in

bankruptcy. This is not correct. In fact, the allowance of interest is a rule of equity and of administrative convenience. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 165 (1946). "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor."[4] *Id.* These equities are based upon the individualized facts of the claimants and the debtor. The Court should have a full record in order to balance the equities.

Moreover, "the general rule 'disallowing' the payment of unmatured interest out of the assets of the bankruptcy estate is a rule of administrative convenience and fairness to all creditors. The rule makes it possible to calculate the amount of claims easily and assures that creditors at the bottom rungs of the priority ladder are not prejudiced by the delays inherent in liquidation and distribution of the estate. But when concerns for administrative convenience and fairness are not present, postpetition interest will be allowed." *Id. In re Hanna*, 872 F.2d 829 C.A.8.Iowa,1989. Here, there is no prejudice to other similar creditors. There are no other railroad employees who are still waiting for their MPA payments.

As a matter of completeness, this Court should have the entire record before it renders a decision on interest. This Court should review the treatment of other MPA wage claims. However, much of the evidence on this issue is contained in the voluminous files of the PCTC bankruptcy case. These files are not yet available to the Claimants. This Court should simply

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[4] The basis for this rule of equity was explained by the Supreme Court in *Nicholas v. U.S.* 384 U.S. 678, 86 S.Ct. 1674 (1966). Tracing the prior law, the *Nicholas* Court concluded that prior decisions concerning the suspension of interest on prepetition claims "reflect[ed] the broad equitable principle that creditors should not be disadvantaged vis-a-vis one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws." *Id.* at 683. Here, in contrast, these equitable considerations do not exist

dismiss this Petition and defer ruling on the issue of interest until it is fully and specifically briefed based upon the complete record, if and when the Arbitration Panel awards interest.

Moreover, there are circumstances where the award of interest is affirmatively allowed. Courts have specifically allowed interest when a railroad subsequently becomes solvent. In the *Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 830 F.2d 758 (7th Cir.1987) the railroad turned out to be solvent. The government took the position that it was entitled to interest at the rates set in 26 U.S.C. §§ 6621 and 6622, and not at the rate of 7.5/8.5%, which was the interest rate determined by the district court to be fair and equitable under 11 U.S.C. § 205(e) of the Bankruptcy Act. In affirming the rate of interest set by the district court, the Seventh Circuit followed the balancing of the equities teaching of the Court in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. at 165, 67 S.Ct. at 241. 830 F.2d at 765-66.[5] Here, the record is

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because the delays in paying the Claimants were caused by PCTC, not by the bankruptcy process.

[5] There is a long line of cases holding that post-petition interest should be paid where the estate becomes solvent. In *American Iron and Steel Manufacturing Co. v. Seaboard Air Line*, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914), the Court considered the question whether interest should be paid on a claim for supplies furnished to a railroad which had gone into receivership. By statute, the debt was secured by a lien which had priority over mortgages. The Court pointed out that the reason for the rule denying interest after insolvency "is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full." *Id.* at 266, 34 S.Ct. at 504 The Court then stated:

> But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication and as a fixed liability was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. *2 Blackstone's Comm.* 488; *Cf. Johnson v. Norris*, 190 Fed.Rep. 459, 460 (5).

Id. at 266-67, 34 S.Ct. at 504-05.

incomplete as to whether Penn Central was successfully reorganized such that it is currently solvent. If the facts show that it has become solvent, then this would be one circumstance justifying the collection of interest.

Similarly, it is clear that "first priority" expenses may be entitled to interest. In a Code case involving § 503, the Fourth Circuit held "that the government is entitled as a first priority expense of the bankruptcy estate to full payment of the taxes claimed, the penalties for failure to pay them on time, and **interest** from the date that it accrued." *United States v. Friendship College, Inc.*, 737 F.2d 430, 433 (4th Cir.1984) (footnote omitted). Here, if the payment of MPA wage guaranties is considered an administrative expense it is entitled to "first priority" and interest thereon.[6]

Further, the record seems to show that Claimants' MPA claims were never discharged, and in fact, may not have been dischargeable at all. As discussed below, Section 1167 of the Bankruptcy Code sharply limits the ability of bankruptcy law to modify railway labor agreements. The significance of dischargeability is important because it is settled law that interest continues to accrue on claims that are not discharged. Thus, "creditors may accrue as to the debtor personally post-petition interest on nondischargeable debts while a bankruptcy is pending." *Leeper v. Pennsylvania Higher Educ. Assistance Agency*, 49 F.3d 98, 101-02 (3d Cir.1995); *See also Matter of Johnson*, 146 F.3d 252 (5th Cir. 1998); *Pardee v. Great Lakes Higher Educ. Corp.*, 218 B.R. 916, 921 (9th Cir.1998); *Fullmer v. United States*, 962 F.2d 1463, 1468 (10th Cir.1992); *Burns v. United States*, 887 F.2d 1541, 1543 (11th Cir.1989); *Hanna,* 872

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[6] Section 503(b)(1)(A) states that (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including- (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]
11 U.S.C. § 503(b)(1)(A).

F.2d 829, 831 (8th Cir.1989); *Bradley v. United States*, 936 F.2d 707, 709-10 n. 3 (2d Cir.1991) (stating that the weight of authority supports the view that a debtor is personally liable for post-petition interest on unpaid taxes).[7]

D. PCTC/APU Has Failed To Allege Or Prove Any Of The Elements Needed For Injunctive Relief.

Here, PCTC/APU is seeking to enjoin the actions of a co-equal court. Yet it has not even attempted to plead, let alone prove, the necessary factors for an injunction. In order to obtain injunctive relief, the debtor, in accordance with Bankruptcy Rule 7065 and Fed.R.Civ.P. 65, has the burden of demonstrating to the court the following: substantial likelihood of success on the merits, irreparable harm to the movant, harm to the movant outweighs harm to the nonmovant, and injunctive relief would not violate public interest. *See, ML Barge Pool*, 71 B.R. at 164; *Sunbelt Savings Ass'n v. Truman*, 95 B.R. 55, 57 (N.D.Tex.1988). The movant must also give the requisite notice of the proposed application for relief. *See also, In re Wedgewood Realty Group*, 878 F.2d at 701.

Here, there is no evidence on any of these traditional prongs. Moreover, there can be no irreparable harm in allowing the arbitration to proceed to conclusion. Any judgment will be enforced only by a court of competent jurisdiction subject, as appropriate, to any relevant prior proceedings. Indeed, any arbitration decision will be subject to review and appeal. There is no harm to the movant as it has been able to litigate this case for nearly forty years. There is far

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[7] *See also In re Strauss*, 216 B.R. 638 (Bankr. N.D. Cal. 1998) (interest continues to accrue on nondischargeable claim during pending of bankruptcy case); *In re Pardee*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *judgment aff'd*, 193 F.3d 1083, Bankr. L. Rep. (CCH) ¶; 78022 (9th Cir. 1999) (claim for unmatured interest on nondischargeable debt was not discharged, although it could not be collected from estate, but only from debtor personally); *In re Boone*, 215 B.R. 386, 31 Bankr. Ct. Dec. (CRR) 1027, 39 Collier Bankr. Cas. 2d (MB) 24 (Bankr. S.D. Ill. 1997) (although claims for unmatured interest on nondischargeable claims are, in most instances, disallowed in the context of the case, meaning that the creditor cannot collect such unmatured interest from the

greater harm to the Claimants, many of whom have already died during the delays largely created by the movant. Finally, delay would violate the public interest in the final adjudication of disputes.

E. The Defendant Has Unclean Hands Because It Is Both Responsible For Much of the Delay In This Case And Because It Requested The Arbitration Which It Now Seeks To Enjoin.

The granting of an injunction is an equitable power of the court. However, a movant must come into equity with clean hands. The doctrine of unclean hands is an equitable doctrine standing for the proposition that he who comes in into equity must come with clean hands. *Precision Inst. Man. Co. v. Aut. Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). The doctrine applies when a party seeking equitable relief has committed an inappropriate act related to the equity the party seeks. *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 161 (3d Cir.2001). In *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 534, 535 (3d Cir. 1948), the Court wrote:

> No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim. . . .

Here, Penn Central has already been found to have unclean hands based upon its prior efforts in delaying this litigation. Now, it seeks to enjoin the arbitration which it requested and which it scheduled. Penn Central's unclean hands have forfeited its right to equitable relief.

F. Penn Central Has Waived Any Right To An Injunction.

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assets of the estate, the debtor's personal liability for such unmatured interest is not discharged after the case has concluded).

For thirty years the Petitioner has failed to raise any objection to the jurisdiction of the federal courts (or the Surface Transportation Board) to order arbitration of complete relief in these cases. Indeed, it failed to mention any perceived limitation on this arbitration to U. S. District Judge Oliver three years ago, before thousands of dollars and hours were spent litigating these cases.

G. Penn Central Is Forum-Shopping.

Since 1979, Penn Central has favored reference of this entire case (including interest, punitive damages and fees) to arbitration. In fact PCC entered into an arbitration agreement in furtherance of the Court's order to arbitrate. Exhibit B. Its need for injunctive relief arose only when it became concerned that it might not prevail in this arbitration. After forty years of litigation in the Northern District of Ohio, PCTC/APU has suddenly sought a new forum. Bankruptcy Courts discourage the practice of forum shopping designed to find the most favorable court. *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir.1990)(noting "reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process.")

Moreover, Penn Central has attempted before to find a new decision-maker as when it unsuccessfully moved to force the recusal of the neutral arbitrator. In bankruptcy, "[j]udges have an obligation to litigants and their colleagues not to remove themselves needlessly . . . because a change of umpire in mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping." *In re Betts,* 143 B.R. 1016, 1020 (Bankr.N.D.Ill.1992), *quoting, In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir.1988).

H. APU Is Not Entitled To An Advisory Opinion Declaring Its Future Liability In A Prospective Action Regarding Whether Its Debts Have Been Discharged.[8]

Finally, APU alleges that it has been discharged from all pre-petition, post-petition, and post-confirmation debts. First, it should be noted that APU's attempt to have the Court rule on this dispositive issue arises from the last sentence of its proposed order. APU's proposed conclusion of law and fact was never a part of Order No. 4349. APU apparently believes that it can slip this additional conclusion into a court order without the scrutiny of either the Court or the Claimants. APU is attempting to extract a dispositive ruling by concealing it in the last sentence of a Court order, without having briefed this issue on the merits in this Petition.

Second, the record indicates that workers' claims under the MPA may not have been discharged in bankruptcy. As noted *supra*, interest continues to accrue on debts which are not discharged. By statute, Congress explicitly prohibited any court sitting as a reorganization or Bankruptcy Court from interfering with railway labor agreements. Section 77(n) of the Bankruptcy Act, 11 U.S.C. s 205(n), provides:

> No judge or trustee acting under this (Act) shall change the wages or working conditions of railroad employees except in the manner prescribed in (the Railway Labor Act). . . .

Section 77(N) specifically precluded a reorganization court or trustee from doing anything to modify or affect wages or working conditions of railroad employees except in the manner prescribed by the Railway Labor Act (45 U.S.C.A. § § 151-164).

Section 77(N) was recodified as Section 1167 which similarly provides that:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a

[8] This Petition is procedural in nature as is Claimants' Response, so perhaps the Court need not reach the merits here. However, even on the merits the Claimants have good authority as discussed in this section.

> collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act."

The legislative history of this bankruptcy section provides that:

> Section 1167 is derived from present section 77(n) [section 205(n) of former title 11]. It provides that notwithstanding the general section governing the rejection of executory contracts (section 365), neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act [section 151 et seq. of Title 45, Railroads], except in accordance with section 6 of that Act [section 156 of Title 45]. **The subject of railway labor is too delicate and has too long a history for this code to upset established relationships. The balance has been struck over the years. This provision continues that balance unchanged.** House Report No. 95-595." (Emphasis Added)

1994 Acts. House Report No. 103-835, see 1994 U.S. Code Cong. and Adm. News, p. 3340.

Congress was concerned with permitting Bankruptcy Courts to interfere with labor agreements. Thus, in railroad bankruptcy law, there is an explicit statutory "carve-out" for labor protection agreements.

- **The RLEA Case.**

The United States Court of Appeals for the Sixth Circuit has held that reorganization courts are barred from modifying or discharging labor protection agreements like the MPA. *Railway Labor Executives' Ass'n, Broth. of Locomotive Engineers and Congress of Ry. Unions v. Patton*, 500 F.2d 34 (6th Cir. 1974). In RLEA, a court sitting in bankruptcy attempted to discharge the payments due to railway employees under a labor protection agreement.

RLEA arose out of the bankruptcy of the Erie Lackawanna Railway Company and is related to the present case. As in Penn Central, the Erie Lackawanna Railway Company, the debtor and the bargaining representatives of its employees entered into protection agreements

required the railroad to guarantee that none of its employees "would be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during their employment." This is virtually the same language used in the Penn Central MPA.

Subsequently, on June 26, 1972, the debtor filed a reorganization petition under § 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1970). However, unlike Penn Central, the Trustees of the Erie Lackawanna filed a petition for reconsideration of the employee protection agreements before the ICC and the petition before the District Court for the suspension of wage payments required by those agreements. The District Court, sitting in bankruptcy, agreed with the railroad, and attempted to resolve the MPA claims through bankruptcy.

The Sixth Circuit Court of Appeals reversed the lower court and lifted the injunction. The Sixth Circuit Court of Appeals held that under § 77(n) of this title which provides that no judge or trustee acting under this title could change wages or working conditions of railroad employees except in manner prescribed in Railway Labor Act, § 151 *et seq.* of Title 45, the district court acting as reorganization court erred in ordering suspension of previously negotiated railroad employee protection agreements and impoundment of funds which would otherwise have been paid to employees. *Id.*

- **The *Bildisco* Case.**

Similarly, the United States Supreme Court has held that section 1167 prohibits Bankruptcy Courts from altering labor protection agreements. In *U.S. v. Bildisco & Bildisco*, 465 F.Supp. 513 (1984), the United States Supreme Court relied upon Congress' carve-out for railway labor protections in order to protect bankruptcy jurisdiction over all other labor agreements. In *Bildisco,* the Court ruled that labor agreements were executory contracts which

were subject to rejection under § 365. Significantly, the court premised its holding in part on the existence of § 1167 and Congress' unqualified protections for railway labor agreements:

> The text of § 365(a) indicates that Congress was concerned about the scope of the debtor-in-possession's power regarding certain types of executory contracts, and purposely drafted § 365(a) to limit the debtor-in-possession's power of rejection or assumption in those circumstances. Yet none of the express limitations on the debtor-in-possession's general power under § 365(a) apply to collective-bargaining agreements. **Section 1167, in turn, expressly exempts collective-bargaining agreements subject to the Railway Labor Act, but grants no similar exemption to agreements subject to the NLRA [National Labor Relations Act]**. Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.

Bildisco, 465 U.S. at 522, 104 S.Ct. at 1194 (footnotes omitted).

Thus, because Congress unequivocally carved out railway labor agreements in § 1167, the United States Supreme Court denied similar carve-out protections to other non-railway labor agreements. In a separate footnote, the Court quoted § 1167 and recited much of the legislative history set forth above.[9]

- **The *Hoch* Case.**

During the course of the PCTC bankruptcy, this Court decided one case which construed Section 77(n) as it relates to tort claims. *In the Matter of Penn Central*, 419 F.Supp. 1370 (D.C. Pa. 1976)(the "*Hoch* Case"). In the *Hoch* Case, Albert Hoch, an injured Ford worker, sought compensation from Penn Central. *Id.* The Court denied the claim on the grounds that only an employee of Penn Central was entitled to protection under 77(n). *Id.* In doing so, the Court

[9]*Bildisco* stands for the proposition that, unlike **railway** labor agreements, non-railway agreements can be discharged in bankruptcy without special procedures. Congress subsequently

recognized the application of 77(n) and its mandatory control over the Penn Central bankruptcy. In contrast, in this case, the Courts have already found that the Claimants were employees of Penn Central. *See ICC Order supra* and the 1976 Lambros Order at 14-15. Exhibit G.

During the course of the PCTC bankruptcy, over $116 million was paid out in MPA claims. PCTC routinely paid these claims within 70 days of filing and without any reduction by the Trustee. Thus, consistent with section 1167, the record seems to establish that MPA claims were not discharged. Accordingly, the award of interest is appropriate.

I. PCTC and APU Have Failed To Provide Any Evidence That Respondents' Claims Were Discharged By This Court.

There is another reason why this Court should wait until a complete record is available. PCTC and APU have the burden of proving their allegations. "Discharge in Bankruptcy" is an affirmative defense which must be alleged and proven. *See* Fed. R. Civ. P. 8(c). Even assuming that the discharge of railway labor agreements was available through a reorganization Court, PCTC/APU have failed to provide any evidence that Claimants' cases were in fact discharged. It was the position of PCTC, at least until the 1980s, that the Claimants were not employees of Penn Central and were not owed any payments under the MPA. It is not clear that the Claimants were ever listed as creditors on any schedule that was submitted to the Reorganization Court and never received notice that their claims would be subject to discharge. Indeed, the stipulations entered into by the Claimants protected their rights to adjudicate their claims before there could be any consideration of dischargeability.

"Discharge under the Code, however, presumes that all creditors bound by the plan have been given notice sufficient to satisfy due process." *Broussard v. First Am. Health Care of Georgia, Inc. (In re First Am. Health Care of Georgia, Inc.)*, 220 B.R. 720, 723

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passed legislation to overrule the lesser protections found in *Bildisco* and to strengthen

(Bankr.S.D.Ga.1998). Due process is met if notice is reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Thus, if a creditor is not given reasonable notice of the bankruptcy proceeding, its claim cannot be constitutionally discharged. *See, In re Longardner & Assocs., Inc.*, 855 F.2d 455, 465 (7th Cir.1988).

Here, PCTC/APU have failed to provide any evidence that Claimants' cases were considered by this Court, were submitted on any schedule, or that Claimants received notice that the stipulations were being revoked and that their cases could no longer proceed to arbitration. Thus, PCTC/APU have failed to prove that they should be granted relief from their Petition or that this Court's equitable powers should be invoked.

IV. CONCLUSION

For all the foregoing reasons, the Petition should be denied. This Court should wait until the Arbitration Panel establishes the value (if any) and elements of Claimants' damages under the MPA. Then, after briefing and with a full record, the appropriate Court should decide the issue of interest and the responsibilities of PCTC/APU.

Respectfully submitted,

Rudolph J. Di Massa, Jr.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA
Phone: 215-979-1506
fax: 215-979-1020
E-Mail:DiMassa@duanemorris.com

protections for non-railway labor agreements.

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Fax: (216) 861-6679
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. Mail to:

Matthew J. Siembieda
Timothy D. Katsiff
Blank Rome, LLP
One Logan Square
Philadelphia, PA 19103

Michael L. Cioffi
Nathaniel R. Jones
Jason Groppe
Blank Rome, LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202

on this 21 day of December, 2007

Carla M. Tricarichi
Attorney for Plaintiffs

A

MPA 1 REV. PRINTED IN USA 10-70 MU

PENN CENTRAL TRANSPORTATION COMPANY

Engine or Train Service Claim for Compensation Pursuant to Merger Protective Agreement

PLAINTIFF'S EXHIBIT A

* Claim for Month of MAY, 1975. Cincinnati Division

JUN 17 1975

DAILY RECORD OF WORK PERFORMED (Fill out for each day. On days not worked show reasons therefor, i.e., rest day, vacation, holiday, sickness, (job annulled, personal reasons, etc.

A. EMPLOYE IDENTIFICATION

Name: P.V. BEHNEN	Occupation: TRAINMAN	Crew: ROAD XTRA BD (RICHMOND)
Employe No.: 475294	Social Security Number: 316-36-4812	
RR Point to Receive Company Mail: RICHMOND		
Name of Prior Right Roster (PRR) CINCINNATI (NYC)		Roster Standing: 17d

B. COMPENSATION EARNED - ADJUSTMENT CLAIMED

(1) Monthly Base Period Compensation Guarantee . . . $ ~~1362.63~~ offset 67.88 1294.74

(2) Total Earnings for Month. . . . . $ 915.61

(3) ADJUSTMENT CLAIMED (Subtract B(2) from B(1)). . $ 379.13

(4) All Other Compensation Received From Company (W-2 Chargeable) . $

(5) Number of Days this Month Applied for RR Unemployment Insurance. 0

I HEREBY CERTIFY THAT THIS INFORMATION IS TRUE AND CORRECT:

(Signature) P V Behnen

(Date)

Date	Terminal	Train No.	Crew or Job No.	Class of Service	Earnings
1	RICHMOND	XTRA BD		LOST	
2	—	—	210	YARD	42.04
3	—	—	RELIEF 001	FRT	~~53.19~~ 65.32
4	—	—		LOST	
5	—	—	210	YARD	55.77
6	—	—		LOST	
7	—	—	RELIEF C/C2	FRT	50.48 64.51
8	—	—	RSN3	FRT LOST	45.32 48.59
9	—	—	KL142	LOCAL	46.[illegible] 45.04
10	—	—		LOST	
11	—	—	RELIEF PR1	FRT	~~80.89~~ 82.07
12	—	—	210	YARDS	63.47 63.50
13	—	—	210	YARDS	62.77 62.74
14	—	—		LOST	
15	—	-		LOST	
16	—	—	OFF FOR NTU		WA Nerd[illegible] 54.25

Date	Terminal	Train No.	Crew or Job No.	Class of Service	Earnings
17	RICHMOND	XTRA BD	KL142	LOCAL	41.02
18	—	—		LOST	
19	—	—		LOST	64.8
20	WA [illegible]		[illegible]		
21	—	—	[illegible]	LOCAL	41.19
22	—	—	RNM2 [illegible]	FRT	35.83 61.18
23	—	—		LOST	
24	—	—		LOST	
25	—	—		LOST	
26	—	—	[illegible] C13	FRT	72.41
27	—	—	C14 [illegible]	FRT	72.89 +6.92
28	—	—		LOST	
29	—	—	K1-A	YARD	48.23
30	—	—		LOST	
31	—	—		LOST	
Earnings, 17th thru end of month					408.49
Earnings, 1st thru 16th					507.12
Total Earnings for Month (Enter at Item B(2))					915.61

* THIS FORM TO BE FILED WITHIN 60 DAYS FROM END OF MONTH FOR WHICH ADJUSTMENT IS CLAIMED

4/2 39.90
~~4/30 62.67~~

1362. 1294.74
1062.19
232.55

868.79
62.67
931.46
130.73
1062.19

C. (1) Your claim is denied as our investigation has developed.

☐ a - Your total chargeable compensation for the month in question exceeded your guarantee.

☐ b - You could have held position ________ producing a rate equal to or higher than your guarantee.

☐ c - Your earnings would have equaled or exceeded your guarantee had you been available for service the entire month.

☐ d - Application of transition factor letter of agreement dated August 14, 1968, plus your compensation exceeds your guarantee.

☐ (2) Your claim as presented is denied, however you will be allowed an adjustment as indicated.

☐ (3) Other ________

REMARKS:

7

PENN CENTRAL TRANSPORTATION COMPANY

MERGER PROTECTIVE AGREEMENT

SOUTHERN REGION — Cincinnati, Ohio

Location Richmond, Indiana — 8/13/75

Name P. V. Behnen — E - F - C - (B)

Referring to your claim for compensation in the amount of $ 379.13 submitted for the month of May, 1975 pursuant to the Merger Protective Agreement.

Claim in the amount of $ 232.55 (less any amount recovered by the Railroad Retirement Board) is being carried in your regular pay draft that you will receive 8/22/75.

Difference being allowed and that claimed by you is the result of your - - - -

(✓) current guarantee being - - - - $ 1,294.74.

(✓) having been paid more than shown received - - - - $ 931.46.

(✓) not including earnings lost as a result of laying off - $ 130.73.

( ) not being available on rest days - - - - $ _____.

( ) lost earnings as a result of _____ $ _____.

( ) not taking job _____ which was assigned to a man junior to you.

From _____ this position earned $ _____.

From _____ you earned $ _____.

Therefore, you will be paid $ 232.55.

Due to the foregoing reasons checked, your claim as submitted, is denied.

J. M. LeGates
Division Superintendent

1,418.39 — 8782
1294 74 — 1307
12365 — 10089
10089
-6

SOUTHERN REGION

Indianapolis, Indiana

12/29/75

F V Behnen, Brkm

Richmond

Dear Sir:

We have received instructions to upgrade all 1975 guarantees that have not previously been upgraded. Payment(s) for line reflecting balance due and/or deduction(s) for line reflecting overpayment will be made in pay period 96 for which you will receive your check on 1-9-76

	January	February	March	April	May
Upgraded Guarantee		1418.39	1418.39		1418.39
Old Guarantee		1294.74	1294.74		1294.74
Difference		123.65	123.65		123.65
Back Pay		119.79	100.59		100.89
Balance Due		3.86	23.06	—	22.76
Overpayment					

The column reflecting the back pay will not necessarily be what you received. If a job was held against your guarantee, the back pay that job received will be shown in that line, or if you layed off, last earnings will be added in.

DIVISION SUPERINTENDENT

AGREEMENT FOR ARBITRATION

THIS AGREEMENT, made this 18 day of June, 1980, at Cleveland, Ohio, by and between those persons whose names are set forth and contained on Exhibit "A" attached hereto and made a part hereof by reference (all of whom are hereinafter collectively called the "Employees"), and PENN CENTRAL CORPORATION, successor to Penn Central Transportation Company and its Trustees, a Pennsylvania corporation (hereinafter called the "Employer").

WITNESSETH:

WHEREAS, disputes or controversies exist between Employees and Employer with respect to the interpretation, application, or enforcement of the provisions of certain Merger Protective Agreements of May 20, 1964, or of January 1, 1964, which disputes are the subjects of various actions pending in the United States District Court for the Northern District of Ohio, Eastern Division, at Nos. C69-722, C69-675, C69-947, and C74-914;

WHEREAS, the parties hereto desire to follow as nearly as possible the provisions of Section 1(e) of said Merger Protecive Agreement for the purpose of settling, concluding and resolving the said dispute or controversy, all according to the terms, conditions and provisions of this Agreement,

NOW, THEREFORE, the parties hereto agree as follows:

(1) There shall be established an arbitration committee (hereinafter called the "Committee").

(2) The Committee shall consist of one member designated by the Employees, one member designated by the

PLAINTIFF'S EXHIBIT B

ALL-STATE LEGAL

Claimants:

Robert W. Watjen, Philip F. Franz, Anna Mae Wilger, Thomas D. O'Neil.

Issue No. 4:

Are the claimants entitled to the benefits of the Merger Protective Agreement of 1964?

Claimants:

David C. Bundy, James E. Feldscher.

Should any disagreement exist with respect to the framing of the issues above-listed, the parties agree that the opinion of the U.S. District Judge Thomas Lambros dated November 29, 1979 shall control.

For the Employees

By: _____
MICHAEL R. KUBE
Employee Member of Committee

For the Employer
Penn Central Corporation

By: _____
N.M. BERNER
Carrier Member of
Committee

C

CASE No. 99-3014

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTONIO AUGUSTUS, et al.,
Petitioners
v.

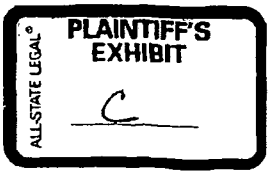
SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR REVIEW FROM
THE SURFACE TRANSPORTATION BOARD

FINAL BRIEF OF INTERVENOR PENN CENTRAL CORPORATION

Submitted by:
William F. Kershner
Matthew J. Maguire
Pepper Hamilton LLP
Suite 400
1235 Westlakes Drive
Berwyn, PA 19312
(610)640-7800

Attorneys for Intervenor



Although the time it took the arbitration panel to render its decision does not support Petitioners' argument that it exceeded its authority, it should be noted that Petitioners themselves are responsible for the inordinate amount of time the entire proceedings have consumed. Had Petitioners filed claims for benefits and submitted their disputes directly to the arbitration procedure under the MPA those disputes would have been resolved far more expeditiously and efficiently than has been the history of this litigation.

CONCLUSION

For the reasons set forth above, Intervenor Penn Central Corporation respectfully requests that this Court affirm the Surface Transportation Board's decision to affirm the arbitration panel's denial of merger protection benefits to the Petitioners.

Respectfully submitted,

William F. Kershner
Matthew J. Maguire
Pepper Hamilton LLP
Suite 400
1235 Westlakes Drive
Berwyn, PA 19312
(610)640-7800

Attorneys for Intervenor
Penn Central Corporation

Dated: June 20, 2000

D

BEFORE THE ARBITRATION COMMITTEE

STEVEN H. STEINGLASS, ESQ.
NEUTRAL ARBITRATOR

MICHAEL J. KNAPIK, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-722
ROBERT WATJEN, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-675
DAVID C. BUNDY, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-947
G.V. SOPHNER, et al., Claimants, v. PENN CENTRAL, Carrier.	:	Case No. 69-914
	:	**DEFENDANT'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

Defendant, Penn Central Corporation ("PCC"), by and through its undersigned counsel, hereby serves its Responses and Objections to Plaintiffs' First Set of Interrogatories as follows:

General Objection No. 1: PCC objects to the Interrogatories to the extent that they seek information that is not relevant to the subject matter of this action, or seek information not reasonably calculated to lead to the discovery of admissible evidence.

General Objection No. 2: PCC objects to the Interrogatories to the extent that they are overly broad, unduly burdensome, oppressive, or impose an unnecessary and unreasonable burden and expense on PCC.

General Objection No. 3: PCC objects to the Interrogatories to the extent that they are vague, undefined and/or ambiguous.

General Objection No. 4: PCC objects to the Interrogatories to the extent that they seek public information to which Plaintiffs have equal access and which Plaintiffs can just as easily obtain.

General Objection No. 5: PCC objects to the Interrogatories to the extent that they seek information that PCC has already produced to Plaintiffs.

General Objection No. 6: PCC objects to the Interrogatories to the extent they seek information that cannot be obtained after a reasonably diligent search.

General Objection No. 7: PCC objects to the Interrogatories to the extent that they request information that is already within Plaintiffs' knowledge, possession, and/or control.

General Objection No. 8: PCC objects to the Interrogatories to the extent that they seek information regarding matters that continue to be investigated and/or evaluated.

General Objection No. 9: PCC objects to the Interrogatories to the extent that they seek information protected by the attorney-client privilege, work-product doctrine, and/or any other applicable privilege or immunity.

E

BEFORE THE ARBITRATION COMMITTEE

In the Matter of:
ROBERT WATJEN, et al.,
Plaintiffs,
vs. Case No. 69-675
PENN CENTRAL,
Defendant.

MICHAEL J. KNAPIK, et al.,
Plaintiffs,
vs. Case No. 69-722
PENN CENTRAL,
Defendant.

DAVID C. BUNDY, et al.
Plaintiffs,
vs. Case No. 69-947
PENN CENTRAL,
Defendant.

G.V. SOPHNER, et al.
Plaintiffs,
vs. Case No. 74-914
PENN CENTRAL,
Defendant.

Deposition of MICHAEL R. WEINMAN

September 27, 2007
10:00 a.m.

Taken at:
Tricarichi, Carnes & Clements
614 Superior Avenue, NW
Cleveland, Ohio

Kristin L. Wegryn, R.P.R.

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Q. And you have not provided any opinion on that; is that correct?
A. That's correct.
Q. And you have no expert opinion on that subject, do you? 12:27:27
A. That is correct.
Q. Did you ever hear Saunders or anyone else at Penn Central make a similar statement --
A. No, I did not. 12:27:34
Q. -- regarding the Merger Protection Agreement?
A. No.
Q. Did you hear them make any statements to the contrary? 12:27:41
A. To the contrary of this quote?
Q. Yes.
A. The only statement I heard with regard to the Merger Protection Agreement was by Alford Pearlman, who indicated that he 12:27:54 thought the Merger Protective Agreement was generous.
Q. That's the only comment you've heard?
A. That's correct. 12:28:02

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Q. Okay. Did he say why it was generous?
A. No. He did not elaborate.
Q. Your expert report, I'm correct, am I not, that it did not render an opinion as to 12:28:21 whether the Merger Protection Agreement applies to these particular plaintiffs?
A. That's correct, it does not indicate anything in that regard.
Q. You weren't asked to do that? 12:28:33
A. That's correct.
Q. You don't have -- do you have an opinion in that regard?
A. No, I don't.
Q. Do you have any -- strike that. 12:28:39 Were you provided any -- have you ever known why Penn Central agreed to the Merger Protection Agreement?
A. Do I know why the Penn Central agreed to it? 12:29:03
Q. Yeah. Are you aware of any information in that regard?
A. I could speculate.
Q. I don't want you to speculate.
A. That would be all I would be doing. 12:29:14

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Q. You didn't render any opinion in your expert report regarding the nature of the job protections in the Merger Protection Agreement; is that true?
A. That's true. 12:29:35
Q. And is it true that you've not been asked to do that?
A. That's true.
Q. And is it also true that you don't have any opinion in that regard? Is that true? 12:29:41
A. That's true.
Q. Do you know who the defendant is in this case?
A. Not by name.
Q. Do you know who's ultimately paying 12:30:18 your bills?
A. Oh, would you strike my last response? The defendant. My mind heard plaintiff. I believe the defendant is American Premium Underwriters. 12:30:33
Q. Why do you come to that understanding?
A. That was what was conveyed to me by Blank Rome.
Q. What happened to Penn Central? 12:30:51

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A. Would you be more specific?
Q. Why are they not the defendant, do you know?
A. Well, Penn Central, to my knowledge, does not exist, but its successor 12:31:03 company is known as American Premium Underwriters.
Q. Just a little housekeeping with a few last questions and we'll be out of here. You mentioned that you had given 12:31:34 depositions prior to today.
A. Yes.
Q. How many? You've given four of them?
A. Approximately. 12:31:43
Q. Can you tell me what cases you gave those in?
A. Not by name, but I can tell you that one involved a litigation regarding patent infringement in accessible wheelchair devices, 12:32:00 and another was with regard to a personal injury or fatality that occurred on a railway in New Jersey.
Q. Any others that you can recall?
A. None that I can specifically recall 12:32:25

CERTIFICATE

The State of Ohio,)
SS:
County of Cuyahoga.)

I, Kristin L. Wegryn, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, MICHAEL WEINMAN, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the above-referenced witness was by me reduced to stenotypy in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney for either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this day of , 2007.

Kristin L. Wegryn, Notary Public
within and for the State of Ohio

My commission expires July 13, 2008.

SIGNATURE OF WITNESS

The deposition of MICHAEL WEINMAN, taken in the matter, on the date, and at the time and place set out on the title page hereof.

It was requested that the deposition be taken by the reporter and that same be reduced to typewritten form.

It was agreed by and between counsel and the parties that the Deponent will read and sign the transcript of said deposition.

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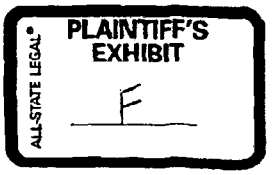
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT WATJEN, *et al.*, Plaintiffs v. PENN CENTRAL Defendants	)	Case No.: 69-675
MICHAEL J. KNAPIK, *et al.*, Plaintiffs v. PENN CENTRAL Defendants	)	Case No.: 69-722
DAVID C. BUNDY, *et al.*, Plaintiffs v. PENN CENTRAL Defendants	)	Case No.: 69-947
G.V. SOPHNER, *et al.*, Plaintiffs v. PENN CENTRAL Defendants	)	Case No.: 74-914
	)	JUDGE SOLOMON OLIVER, JR.

ORDER

Currently pending in these matters is Plaintiffs' Motion to Reinstate and Resume Jurisdiction over the Above Captioned Cases. Plaintiffs originally filed this motion in mid-1998 before Judge



Because the remedy of laches is equitable in nature, the Court must apply the equitable maxim "he who comes into equity must come with clean hands." The Court concludes that Defendant does not come with clean hands. In assessing the causes of delay over the past five years, the Court concludes, based on Plaintiffs' letters calling for new mediation panels and a return to arbitration, that Plaintiffs are no more responsible than Penn Central for the delay. (Pl. Reply Br. Ex. 9, 10.) Penn Central rejected Plaintiffs' calls for a new mediation panel for the remaining *Knapik* plaintiffs, insisting on resuming hearings with the old arbitration panel, even though there is some indication the old panel was no longer hearing cases.[1] Additionally, some portion of the delay in resuming arbitration is attributable to Penn Central's argument that *Watjan* and *Bundy* should not be arbitrated due to laches. This argument is inconsistent with the previous agreement between the parties to follow Judge Lambros' suggestion that *Knapik* be concluded before commencing the other cases. Defendant Penn Central seeks an equitable remedy of laches, but it bears at least as much responsibility as Plaintiffs for the recent delay in these cases.

Even if unclean hands did not bar laches, the facts do not support Defendant's contention that Plaintiffs unreasonably delayed in asserting their rights, either in pursuing a ruling on this motion or in seeking arbitration for their clients. Shortly after filing the motion to reinstate in 1998, the Surface Transportation Board issued its long awaited ruling. It was reasonable for Plaintiffs to refrain from aggressively pursuing their motion to reinstate with the district court, because the STB decision was appealed to the Sixth Circuit, and the case was moving forward again. After the Sixth

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[1] The Court does not make a finding of fact as to the availability of the old arbitration panel. Plaintiff represented at oral argument that at least two of the three members of the arbitration panel had retired and were no longer arbitrating cases. (Tr. pp. 45-46.)

limited purpose of ordering the parties to arbitration and ensuring the parties begin arbitration in a timely fashion.

The Court notes that because of the significant delay, the interests behind Judge Lambros' recommendation to try the cases consecutively before one arbitration panel are outweighed by the interest in resolving the matters expeditiously. Given twenty-five intervening years in which arbitration never commenced in three of the cases, it appears that Judge Lambros' reasonable suggestion did not bear the benefits that he envisioned. Accordingly, this Court finds that the best way to effectively enforce Judge Lambros' arbitration order is to require the parties to proceed to arbitration on all four cases simultaneously. Within sixty days from the date of this Order, the parties shall have chosen arbitrators for each case. In order to facilitate the matter, the parties must agree on a process for choosing arbitrators within fourteen days of this Order. If the parties cannot agree on a process, they must notify the Court as soon as they determine an agreement is not possible, but no later than fifteen days from the date of this Order. Arbitration in the *Knapik* case shall proceed with a new panel only if the Blackwell panel that heard the prior *Knapik* arbitration cannot be reconvened.

The Court believes this is the best way to proceed. However, if the parties both agree, in their own wisdom, to a different process, involving seriatim arbitration or an alternative timeline, the parties may submit such a plan to the Court for approval within fifteen days of this Order. For the reasons and on the terms stated above, Plaintiffs' motion to reinstate is granted.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

February 18, 2005

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

MICHAEL J. KNOPIK,

Plaintiff,

vs.

PENN CENTRAL RAILROAD;

UNITED TRANSPORTATION UNION; and

BROTHERHOOD OF RAILROAD TRAINMEN,

Defendants.

C 69-727

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TRANSCRIPT OF THE ORAL RULINGS OF THE HON. THOMAS D. LAMBROS, JUDGE OF SAID COURT, IN THE ABOVE-CAPTIONED CASE, ON JULY 14, 1976.

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APPEARANCES:

On behalf of the Plaintiff:

Michael R. Kube, Esq.
Peter H. Weinberger, Esq.

On behalf of the Penn Central Transportation Company:

John F. Dolan, Esq.

On behalf of the United Transportation Union, the Brotherhood of Railroad Trainmen:

Norton N. Newborn, Esq.

was available, that they didn't take that work because of the status with respect to their entitlement, the job guarantee not being clarified, and they have asserted that they did not want to take jobs until that status was clarified for fear of prejudicing themselves.

Well, I believe with respect to the question as to whether or not they are entitled to the benefits of job guarantee, that there no longer is a triable issue in that case by virtue of the position stated by the railroad, that that issue need not be submitted to the jury, and this Court may find now as a matter of law that the plaintiffs are employees of the New York Central Railroad as that term is defined in the merger protection agreement, and as that term applies to the job protection agreement and their job guarantee entitlement under the merger agreement.

And it is my view that -- I don't feel that there is any issue, and as a matter of law I think I am entitled to at this time make a finding based on the evidence as well as the representations of the railroad, and I see no necessity of receiving further evidence on this, because

this issue is clear, that the plaintiffs were entitled to the full benefits of the job protection agreement, based on their combined wages of C.U.T. and their New York Central work, and were entitled to this, not only as of 1969, but at all applicable times prior thereto.

It would seem to me that the triable issue remaining in this lawsuit is one stemming out of the merger protection agreement. It is a contract issue, and it would seem to me that in view of the fact that the issues in this case were by agreement of the parties bifurcated at the outset, and we were to try only the liability issues at this time, and the damage questions later, and as this Court is making a finding now relative to the applicability of the merger protection agreement to these plaintiffs and a finding as to their entitlement to job guarantee, and to the extent that there was any dispute between the parties, that issue is now resolved on that finding, and it would seem to me that the issue as to whether or not there was a breach of that agreement is best tried in the context of a damage question, and I think this Court should permit further discovery on that question so that the plaintiffs

we had issues that were joined and negotiated and resolved, perhaps not to the satisfaction of the respective parties, but the mere fact that they are not satisfactorily resolved does not indicate that the resolution was out of bad faith or conspiracy.

Members of the jury, thank you very much, and you are now excused, and before your departure, I would ask that you report to the fifth floor jury commission for further instructions.

Thank you again.

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C E R T I F I C A T E

I, Roy Thompson, Jr., Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

Official Court Reporter